No. 92-1639

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE CITY OF CHICAGO, *et al.*,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF THE PETITIONERS

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REPLY BRIEF OF THE PETITIONERS

SECTION 3001(i) OF RCRA EXCLUDES THE ASH PRODUCED AT A RESOURCE RECOVERY FACILITY THAT BURNS HOUSEHOLD WASTE AND NON-HAZARDOUS COMMERCIAL WASTE FROM REGULATION AS A HAZARDOUS WASTE.

A. The Plain Language Of Section 3001(i) Exempts The Ash Residue Produced At A Resource Recovery Facility Burning Municipal Solid Waste From Regulation As A Hazardous Waste.

Although EDF agrees with the City that "[t]he starting point in interpreting a statute is its plain language * * *," *Good Samaritan Hospital v. Shalala,* 113 S. Ct. 2151, 2157 (1993) (quoted in Resp. Br. 7), EDF bases its argument not on the actual language enacted by Congress in Section 3001(i), but rather on the absence of the word "generation." In the process, EDF has disregarded the plain meaning of the words actually contained in the statute. The plain terms of Section 3001(i) provide that a resource recovery facility burning municipal solid waste is not to be deemed to be storing, treating, managing, collecting, transporting, or disposing of hazardous waste. Congress had no need to add the term "generating" to Section 3001(i) to exempt the ash produced at a municipal incinerator from regulation as a hazardous waste because the plain terms of that Section provide an exemption for every step in the process of handling the ash. The ash is collected, stored, transported, and disposed of in a landfill. Each of these activities falls within the statutorily defined terms in Section 3001(i) and is, therefore, exempt from hazardous waste regulation.

EDF insists that the word "generation" is necessary, even though the process by which the ash is produced—incineration—falls squarely within the statutory definition of "treatment," and treatment is an exempt activity under Section 3001(i). EDF claims that the City cannot rely

on the exemption for treatment because "generation" is a distinct activity that is not exempt from regulation under Section 3001(i), but this claim is based on EDF's unfounded assertion that "treatment" and "generation" are two different activities. See Resp. Br. 14. In this case, there is but one single activity—incineration—that is both the process by which ash is "generated" and "treatment" within the meaning of RCRA.[1] Indeed, EDF acknowledges, as it must, that it is the combustion of waste that generates ash. See *id.* at 16. Since the activity that "generates" the ash is exempt from regulation as "treatment," the word "generation" would have been superfluous had Congress included it in Section 3001(i). Thus, its absence in no way indicates that the ash produced at a resource recovery facility is subject to hazardous waste regulations.[2]

More important, as we note in our opening brief, EDF's argument produces a result precisely the opposite of what the plain language of Section 3001(i) states. If the ash produced by incineration of municipal solid waste at a resource recovery facility were subject to regulation under

[1] We also explain in our opening brief that the term "generation" is inapplicable to waste incineration because material becomes "waste" under RCRA only when it is discarded, and not when it is burned. Pet. Br. 17. EDF responds that this reading would exempt from Subtitle C regulation any entity that handles material that has previously been discarded. Resp. Br. 14-16. But entities with no exemption analogous to Section 3001(i) are still subject to Subtitle C if they treat, store, transport, or dispose of hazardous waste. These entities are subject to regulation because the activities they engage in fall under Subtitle C, not because they "generate" waste.

[2] For this reason, EDF's reference to the provision in 42 U.S.C. § 6921 note—that those who recover methane from landfills "shall not be deemed to be managing, generating, transporting, treating, storing or disposing of hazardous or liquid wastes," see Resp. Br. 18—is irrelevant here. Entities recovering methane do not burn it. They acquire it. Thus, recovering methane does not fall within the statutory definition of "treatment." Congress added the term "generating" because the recovery of methane does not fall within any of the other exemptions.

Subtitle C, the facility would be required to store, transport, and dispose of the ash as a hazardous waste. But the plain language of Section 3001(i) states that these resource recovery facilities "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes." 42 U.S.C. § 6921(i). The language of Section 3001(i) does not limit a resource recovery facility's exemption from Subtitle C regulation to activities prior to the time the waste is incinerated; the exemption is granted without temporal limitation. It applies to everything a resource recovery facility does, not just its handling of waste prior to incineration.[3]

To explain away this textual problem with its argument, EDF contends, first, that the only waste the statute says shall not be deemed to be hazardous waste is the municipal solid waste that is received and burned at a resource recovery facility. See Resp. Br. 16. But that is not what the statute says. If Congress had intended to limit the scope of Section 3001(i) to activities prior to incineration, the statute would provide that the municipal solid waste "received and burned at a resource recovery facility" shall not be deemed to be hazardous waste for purposes of regulation. But Section 3001(i) forbids subjecting a resource recovery facility to Subtitle C regulation without qualification: "[a] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the pur-

[3] For the same reason, the United States is incorrect when it suggests that Section 3001(i) is ambiguous. The United States has suggested that Section 3001(i) may plausibly be construed to exempt only hazardous wastes contained in the incoming waste, but not the ash, from regulation as a hazardous waste. See U.S. Br. 10. As we explain above, this construction is contrary to the plain meaning of the statute because, if Subtitle C applies to the ash produced, stored, and collected at a resource recovery facility, then that facility would be deemed to be storing, disposing of, and managing hazardous waste, in plain violation of the clear command of Section 3001(i).

poses of regulation [under Subtitle C] * * *." 42 U.S.C. § 6921(i). Nothing in this language limits the exemption provided for a resource recovery facility to the municipal solid waste that is received and burned, and nothing in the language can be construed to mean that waste at a resource recovery facility becomes subject to Subtitle C regulation once burned. EDF's construction of the statute thus conflicts with the plain meaning of the statutory language by deeming the City's facility to be collecting, storing, transporting, disposing of, and otherwise managing hazardous waste in the form of ash.

Alternatively, EDF argues that without the word "generating," any exemption provided by Section 3001(i) does not apply to a "downstream" entity that may accept the ash for transport, storage, or disposal. See Resp. Br. 17. This argument is wrong for three reasons. First, it is no more consistent with the plain language than is EDF's primary argument. It is the resource recovery facility itself that must find a way to dispose of the ash it produces. If Subtitle C regulation applies to downstream entities such as landfills, then as EDF acknowledges, Resp. Br. 17, those entities will charge the resource recovery facility the rates for managing, transporting, and disposing of hazardous waste. If resource recovery facilities must pay to manage, transport, and dispose of the ash as hazardous waste, such facilities will, for all practical purposes, be deemed to be managing, transporting, and disposing of hazardous waste regulated under Subtitle C. But that result is forbidden by the language of Section 3001(i).

Second, Congress could not have intended to create an exemption that turned upon whether a resource recovery facility itself transported and disposed of its ash in its own landfill, or used a contractor to transport and dispose of its ash. Although we of course disagree with EDF's claim that the exemption does not apply to an entity downstream from the resource recovery facility, the flaw in its argument can clearly be seen from the absurd-

ity of this position. If Congress had intended to regulate municipal ash as a hazardous waste, surely it would not have intended to exempt the ash if the facility used its own trucks and drivers to transport the ash and its own landfill, instead of utilizing a downstream facility. The exemption either applies to the ash or it does not; but it cannot possibly depend on whether a resource recovery facility hires contractors to transport and dispose of its ash.

Third, Section 3001(i) must reach downstream activities because it expressly exempts "disposal" of municipal solid waste from Subtitle C regulation, and municipal solid waste is not "disposed of" until after it is burned and placed in a landfill. EDF offers two explanations of what the term "disposal" could mean under its reading of the statute, but neither is persuasive. It first claims that burning waste constitutes disposal. Resp. Br. at 13. But RCRA defines the term "disposal" as:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). Placing waste into an incinerator and burning it simply does not fall within this definition—it does not discharge, deposit, inject, dump, spill, leak, or place the waste into or on any land or water. See National League of Cities Br. 16. It is the ash, not the waste that is incinerated, that is disposed of by being placed into a landfill.

EDF's second claim is that "disposal" refers to the waste that the facility does not burn. See Resp. Br. 13-14. But Section 3001(i) applies to facilities that recover energy from "the mass burning of municipal solid waste," with restrictions on the types of waste that the facility "receives and burns," not upon the waste that the facility receives and does not burn. See 42 U.S.C. § 6921(i).

Congress could not have intended that the exemption for disposal would apply only to waste that is not burned. At any rate, since the facility may not accept hazardous waste, none of the waste that is disposed of, but not burned, is subject to hazardous waste regulation even without regard to Section 3001(i). As we note in our opening brief, because a resource recovery facility may accept only household waste and nonhazardous commercial waste to qualify for the exemption, the only potentially hazardous waste that a resource recovery facility disposes of is the ash produced when the municipal solid waste is burned. Therefore, Section 3001(i) makes sense only if it exempts the ash produced at resources recovery facilities from hazardous waste regulations.

Finally, EDF notes that exceptions to remedial statutes should be narrowly construed. Resp. Br. 8, 39. But that canon of statutory construction is of no aid here, since both RCRA itself and Section 3001(i) are remedial legislation: RCRA is addressed to the regulation of waste disposal in general, while Section 3001(i) is specifically addressed to the municipal solid waste disposal crisis. Section 3001(i) should be read no more narrowly than any other portion of RCRA.

B. The Object And Purpose Of Section 3001(i) Support Excluding The Ash Produced At A Resource Recovery Facility From Regulation As A Hazardous Waste.

This Court looks to the "object and policy" of a statute, as well as its plain language, to determine its meaning. *E.g., Crandon v. United States*, 494 U.S. 152, 158 (1990). As we explain, see Pet. Br. 18-20, one of the goals of RCRA was to encourage the development of resource recovery facilities as an alternative to disposing of untreated garbage in landfills and as a means of recovering energy from solid waste.[4] To further this goal,

[4] EDF claims the City and its amici have exaggerated the benefits of municipal solid waste incineration. It disputes the accuracy of the statement by the National League of Cities, et al., that "[i]ncineration reduces pressure on landfill capacity by reducing the volume of MSW by up to 90%." Resp. Br. 29 n.16 (quoting National League of Cities Br. 3). EDF asserts that even with an incinerator, "the community will still need approximately 40 percent of the landfill volume it would have needed without incineration." *Id.* (quoting National League of Cities, *Municipal Incinerators: Fifty Questions Every Local Government Should Ask* 7 (1988)). The latter figure, however, is premised on the assumptions that 30% of a city's waste stream will not be incinerated because of downtime for incinerator maintenance and that the municipal waste stream will include materials that cannot be incinerated such as construction and demolition rubble and old appliances. See *Municipal Incinerators* at 6. Without these assumptions, the figure is 85%. In any event, the record in this case shows that every 10,000 cubic yards of City refuse is reduced to about 1,000 cubic yards of residue, a reduction of 90%. R. 18.

Congress enacted, in Section 3001(i), an exemption for resource recovery facilities burning municipal solid waste. Subjecting these facilities to the potentially enormous expense of disposing of their ash as a hazardous waste would undermine that goal.[5]

EDF does not deny that encouraging resource recovery was one of the purposes of RCRA, but claims, in the face of Congress's repeated statements that one of its goals was to encourage resource recovery, see, *e.g.*, 42 U.S.C. § 6902(1), (10), (11); see also 42 U.S.C. § 6901(b)(1), (b)(8), (c)(1), (c)(3), (d)(2), (d)(3); § 6941a(2),

[5] EDF submits that to avoid the increased costs, local governments will reform their waste collection to reduce the likelihood that the ash will contain hazardous materials. Resp. Br. 26. This may be the outcome that EDF desires in order to further its policy goals, but it is by no means the likely result. Reformed waste collection may be costly and is no guarantee that the ash will not have to be managed and disposed of as a hazardous waste under EDF's view of the statute. It is far more likely, as numerous local governments have pointed out in their amicus briefs, that financially strapped local governments will reduce their costs by ending resource recovery efforts and disposing of untreated municipal solid waste in landfills. See National League of Cities Br. 8; Barron County et al. Br. 17 n.13. EDF has also ignored the fact that it will be difficult for municipalities to dispose of the ash as a hazardous waste because of the limited amount of space available in hazardous waste landfills. See, *e.g.*, N.Y. Br. 2.

(3), that we have overstated the extent to which Congress intended to promote resource recovery. EDF argues that Section 3001(i) should be interpreted only in light of what EDF selects as RCRA's most important purpose: minimizing the risks posed by hazardous waste. But Congress was balancing a number of competing purposes in RCRA. Section 3001(i) is plainly intended to further another of those goals—encouraging resource recovery as a means of addressing the municipal solid waste crisis. It makes no sense to interpret a section manifestly designed to encourage resource recovery only in light of some other goal of RCRA. And even if RCRA had some other goal as its primary purpose, this Court has cautioned that:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 646-47 (1990) (emphasis in original) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987)).

EDF also argues that the entire thrust of the 1984 amendments to RCRA was to increase the stringency of controls on the disposal of hazardous wastes. Resp. Br. 21. This is certainly not true of Section 3001(i). Under no reading was it intended to increase the stringency of regulations on hazardous waste. On its face, Section 3001(i) creates an exception to the restrictions imposed on hazardous wastes. It plainly contemplates that some waste that would otherwise be considered hazardous is not to be regulated as a hazardous waste. Therefore, it simply cannot be interpreted as a part of an effort to increase the stringency of hazardous waste regulations.

Nor is it so incongruous, as EDF suggests, see Resp. Br. 21-22, that Congress would exempt the ash produced at a resource recovery facility from hazardous waste regulations even though the ash might otherwise qualify as a hazardous waste. Other wastes have been exempted from Subtitle C regulations for policy reasons. Congress has, for example, exempted from Subtitle C regulation ash and other wastes generated by the combustion of coal or other fossil fuels; drilling fluid and other wastes associated with the exploration, development, or production of oil, natural gas or geothermal energy; solid waste from the extraction, beneficiation, and processing of ores and minerals; and cement kiln dust wastes. See 42 U.S.C. § 6921(b)(2), (3).[6] Congress thus has frequently balanced the costs and benefits of Subtitle C regulation and determined in some instances to exempt waste that might otherwise be considered hazardous.

EDF correctly notes that some types of resource recovery facilities—those that do not burn municipal solid waste—are regulated under Subtitle C. EDF therefore asserts that we have exaggerated the extent to which Congress wished to promote resource recovery. See Resp. Br. 28-29. But we have never argued that all resource recovery is exempt from Subtitle C regulation. Facilities that routinely accept and burn hazardous waste have received no exemption paralleling Section 3001(i)—plainly because the ash they generate poses greater environmental risks than the ash found at Section 3001(i) facilities that are forbidden to accept hazardous waste for incineration. But the fact that Congress has elected not to broaden Section 3001(i)'s exemption to reach other types of facilities does not mean that the exemption Congress did create should be read grudgingly.

We explain in our opening brief that the exemption provided by Section 3001(i) would be implausibly narrow

[6] Congress directed EPA to prepare a study and promulgate regulations governing these wastes, and exempted them from Subtitle C regulations pending the results of EPA's actions. 42 U.S.C. § 6921(b)(2), (b)(3)(A), (b)(3)(C); § 6982(f), (m), (n), (o), (p). These exclusions have continued, some because EPA has determined that the wastes should not be regulated under Subtitle C, and others pending the outcome of the studies. See Wheelabrator Technologies Br. 8 & n.5 and regulations cited therein.

if it were not construed to apply to the ash produced at a resource recovery facility burning municipal solid waste. In response, EDF argues that the exemption is not narrow because it prevents a resource recovery facility from being considered a hazardous waste treatment, storage, or disposal (TSD) facility subject to Subtitle C permitting requirements. See Resp. Br. 9-10. Even without the Section 3001(i) exemption, however, a resource recovery facility that meets the criteria of that Section would not be a hazardous waste TSD facility because it does not accept hazardous waste.[7] A facility that does not accept hazardous waste for processing would not be subject to regulation as a hazardous waste TSD facility. See *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758, 763 n.12 (S.D.N.Y. 1989), aff'd, 931 F.2d 211 (2d Cir.), cert. denied, 112 S. Ct. 453 (1991). Therefore, if Section 3001(i) does not exempt the ash remaining after incineration, it provides little, if any, benefit, to a resource recovery facility. See *id.*

Nevertheless, EDF asserts that a resource recovery facility gains a benefit from Section 3001(i) because it will not be considered a hazardous waste TSD facility when it receives and burns household waste that may contain some hazardous components. See Resp. Br. 9. What EDF ignores, however, is that household waste has long been defined as non-hazardous by EPA regulations. See 40 C.F.R. § 261.4(b)(1) (1991). Under this household waste exclusion, still in effect, a facility that receives and burns only household waste would not be considered a hazardous waste TSD facility. See *id.* Therefore, if Section 3001(i) exempted only such facilities, it would indeed provide no benefit, for that facility would not be a

[7] A resource recovery facility falls within Section 3001(i) only if it "(A) receives and burns only (i) household waste (from single and multiple dwellings, hotels, motels and other residential sources), and (ii) solid waste from commercial and industrial sources that does not contain hazardous waste identified or listed under this section, and (B) *does not accept hazardous wastes identified or listed under this section* * * *." 42 U.S.C. § 6921(i) (emphasis added).

hazardous waste TSD facility in the first instance. Even if that facility accepted both household waste and non-hazardous commercial waste (as Section 3001(i) permits), it would still not be a hazardous waste TSD facility because it would not be processing hazardous wastes. Given the EPA's household waste exclusion, EDF has yet to explain what Section 3001(i) accomplishes to encourage resource recovery if it does not apply to the ash produced at a resource recovery facility.

C. The Legislative History Of Section 3001(i) Supports Excluding The Ash Produced At A Resource Recovery Facility From Regulation As A Hazardous Waste.

Like the Seventh Circuit, EDF has focussed only on the word "generation" in the Senate Report. We do not rely on that word alone to find an intent to exempt all waste management activities of resource recovery facilities from hazardous waste regulations. The Senate Report must be read in its entirety. The full three paragraphs of the Report set out in our opening brief show that Congress wanted resource recovery facilities to be "commercially viable" and wanted to remove any impediments that might hinder their development, and intended Section 3001(i) to exempt all waste management activities of these facilities from hazardous waste regulations.

In fact, it is EDF that has focussed its argument on a single word. Its position depends entirely upon the absence of the word "generation" in Section 3001(i), and thus it argues that the presence of the word "generation" in the Senate Report underscores the importance of the omission of the word from the statute. See Resp. Br. 33. The presence of the word "generation" in the Senate Report, but not in the statute, however, by no means supports regulating the ash as a hazardous waste. As we explain in our opening brief and reiterate above, Congress did not need to include the word "generation" in Section 3001(i) because the plain meaning of the terms it did use reaches every activity of a resource recovery facility. A legislative report, however, need not be drafted as carefully

as a statute. Inclusion of an unnecessary word in the legislative history does not alter the plain terms of the statute. This is not a case, as EDF suggests, see Resp. Br. 33, in which the Court is asked to rely on legislative history to override the literal language of the statute. Instead, this is a case in which the legislative history serves to confirm that Congress intended exactly what it said in the statute. Indeed, EDF can point to nothing in the legislative history that reflects an intent to limit the exemption from hazardous waste regulation for resource recovery facilities to the facility's waste management activities prior to incineration.[8]

[8] EDF relies only upon letters written by several members of Congress three years after Section 3001(i) had been enacted, and upon subsequent unsuccessful attempts to pass legislation that would have placed certain, more stringent, requirements upon Subtitle D disposal of municipal incinerator ash. See Resp. Br. 34 n.19. Such subsequent legislative history has "very little, if any significance." *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968)). Moreover, EDF's inference that Congress's failure to enact legislation regulating Subtitle D disposal of municipal incinerator ash indicates Congress did not intend to allow such disposal is not the only inference that can be drawn. This Court is "reluctant to draw inferences from Congress's failure to act." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993) (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988)). And the legislation to which EDF refers did not merely provide for Subtitle D regulation of municipal ash; it would have created "under Subtitle D a distinct, more exacting regulatory framework." Resp. Br. 34 n.19. Thus it is equally if not more plausible that Congress did not enact this legislation because it believed that Subtitle D disposal of ash was adequate without additional regulation. See *United States v. Wise*, 370 U.S. 405, 411 (1962) ("Logically several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment * * * including the inference that the existing legislation already incorporated the offered change."). Similarly unpersuasive is EDF's citation of a statement in a Senate Report accompanying one of these proposed amendments that under current law municipal incinerator ash could be regulated under Subtitle C if it tested as hazardous. S. Rep. No. 228, 101st Cong., 1st Sess. 258 (1989). As this Court has stated "[t]he interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here." *United States v. Wise*, 370 U.S. at 411. See also, *e.g.*, *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-20 & n.13 (1980).

Instead, the legislative history of Section 3001(i) shows that Congress intended to expand the existing EPA household waste exclusion. That exclusion provides that "[h]ousehold waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g. refuse-derived fuel) or reused" will not be considered a hazardous waste. 45 Fed. Reg. 33120 (1980) (codified as amended at 40 C.F.R. § 261.4(b)(1) (1991)). Like the statute, the regulation does not use the word "generation"; yet EPA stated in the preamble that it extended to the ash remaining after incineration: "Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g. incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33099. The legislative history of Section 3001(i) makes clear that Congress intended to expand the EPA household waste exclusion "to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources." S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). Nowhere in the legislative history is there any hint that Congress intended to narrow the scope of the EPA household waste exclusion when it enacted Section 3001(i) to exempt facilities that take in non-hazardous commercial waste in addition to household waste. All indications are to the contrary.

EDF argues that since Congress was adding a new provision to RCRA when it enacted Section 3001(i), it could not have been ratifying an administrative interpretation of a pre-existing statute. Resp. Br. 34-36. But we have never claimed that Congress was ratifying an interpretation of a preexisting statute. Rather, our argument is that the legislative history demonstrates that Congress intended to expand the existing EPA household waste exclusion to apply to facilities that accepted nonhazardous commercial

waste in addition to facilities that accepted only household waste.[9] EDF responds to this point only by arguing that Congress did not intend to endorse what the EPA had done because it did not include the word "generation" in Section 3001(i). See Resp. Br. 35. The EPA household waste exclusion, however, also did not include the word "generation," but nevertheless extended to ash. Congress's failure to include a word that did not appear in the EPA regulation is not evidence that Congress intended to narrow the exemption. As we note in our opening brief, it indicates the opposite—Congress's decision to use the same terminology used by the EPA indicates that Congress created an equivalent statutory exemption for resource recovery facilities taking in a broader range of wastes than those covered by the household waste exclusion.

EDF also argues that there is no affirmative evidence that Congress was aware of the EPA's position on the household waste exclusion. Such evidence is not necessary. Congress is presumed to be aware of existing law and administrative interpretations. *Miles v. Apex Marine Corp.*, 489 U.S. 19, 32 (1990); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 (1985); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).[10] And if such evidence were necessary, it is present here. The Senate Report states that Section 3001(i) is intended to clarify the EPA household waste exclusion and refers to

[9] For the same reason, EDF's claim (Resp. Br. 36) that we cannot rely upon ratification because the EPA's household waste exclusion did not address the issue in this case—since it only exempted the ash produced from the incineration of household waste alone—is misplaced. Again, we have never argued that Congress ratified an EPA exclusion that applied to the ash produced at a resource recovery facility burning both household waste and nonhazardous commercial waste. The legislative history, however, shows that Congress enacted Section 3001(i) to include these resource recovery facilities within the EPA household waste exclusion. That exclusion included the ash left after incineration.

[10] *Demarest v. Manspeaker*, 498 U.S. 184 (1991), which EDF cites, is not to the contrary. In that case, this Court concluded that the administrative interpretation was inconsistent with the plain language of the statute. *Id.* at 190.

it as an exclusion applying to the "waste stream." See S. Rep. No. 284, *supra*, at 61. Indeed, Congress entitled Section 3001(i) "Clarification of household waste exclusion," and there is no suggestion that Congress intended to narrow that exclusion. Congress was thus plainly aware of the EPA household waste exclusion and that it applied to the entire waste stream, and not just waste before it is incinerated.

EPA's household waste exclusion is also the answer to EDF's related argument that Congress could not have intended municipal ash to be regulated only under Subtitle D, since it might be reused in unsafe ways. Resp. Br. 22-25. Resource recovery facilities are forbidden to accept anything but household and nonhazardous commercial waste. The household waste exclusion, which applied to the ash produced when household waste was incinerated, never forbade reuse of incinerated household waste, and there was no evidence before Congress when it enacted Section 3001(i) that municipal waste combustion ash had threatened the environment—nor had EPA ever taken that position. Thus, it is far more likely that Congress thought EPA should continue to monitor ash, and address any dangers it might pose under Subtitle D, rather than to restrict the household waste exclusion and impose enormous new costs on municipalities, without evidence that their ash posed serious environmental risks.

D. If The Language Of Section 3001(i) Is Ambiguous, This Court Should Defer To The EPA's Interpretation That The Ash Produced At A Resource Recovery Facility Is Exempt From Hazardous Waste Regulation.

The EPA, the agency charged with administering RCRA, has also interpreted Section 3001(i) to exempt from hazardous waste regulations the ash residue produced at resource recovery facilities when they incinerate municipal solid waste. See Pet. App. 41a. Although we believe that the language of Section 3001(i) and the object and purposes of RCRA plainly support exempting the ash from Subtitle C regulation, if this Court should

find the statute ambiguous, it should defer to the EPA's interpretation.

EDF offers several reasons why this Court should not defer to the EPA's interpretation. First, EDF claims that EPA "flip-flopped" too many times on the ash issue. Resp. Br. 41. Significantly, EDF does not describe any so-called flip-flops. In fact, EPA had only one prior position on the meaning of Section 3001(i), set forth in an interpretation contained in a preamble to its 1985 regulations, that was itself ambiguous. Although EPA announced that it did not see in Section 3001(i) an intent to exempt the ash from hazardous waste regulation if "the ash routinely exhibited a characteristic of hazardous waste," it went on to state that it had no plans to impose any new regulatory burdens on resource recovery facilities because of their highly beneficial nature. 50 Fed. Reg. 28726 (1985). The ambiguity of the preamble is underscored by the subsequent congressional testimony of two EPA officials, described by the court of appeals, see Pet. App. 14a-16a, who did not formally change the agency's position, see U.S. Br. 27 n.14, but who did express a desire to revisit the initial interpretation. Hence, there has been, at most, one change in EPA's position. And this Court has deferred to an agency's position even when it has changed. See, *e.g.*, *Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2161 (1993); *Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991); *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984). Even an agency's changed position is entitled to substantial deference "if there appears to have been a good reason for the change," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1989), and if its change in position is supported by "reasoned analysis." *Rust v. Sullivan*, 111 S.Ct. at 1769 (quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983)). Here, EPA's position is supported by the cogent analysis contained in the administrator's memorandum, and there was a good reason for the change. As the United States notes in its brief (at 24-25), EPA had recently promulgated stricter criteria for the disposal of municipal solid waste under Subtitle D. See 56 Fed. Reg. 50978 (1991) (to be codified at 40 C.F.R. Pt. 258). "The knowledge that EPA gained through promulgation of the Part 258 criteria and the changed circumstances led it to reevaluate previous policy concerns and to conclude that 'disposal of MWC ash in municipal landfills subject to Part 258 criteria will be protective of human health and the environment.'" U.S. Br. 25 (quoting Pet. App. 47a & n.5).

Second, EDF maintains that the EPA's position shou'd be rejected because it is only the agency's litigating position. There is no merit to this claim. EPA is not a party to this case and, therefore, has no litigating position here. No agency interest in this litigation caused EPA to reach the result that it did. Nor is this case like *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988), in which this Court refused to defer to an interpretation of a statute put forth by the agency's counsel "where the agency itself has articulated no position on the question * * *." Here, the agency has articulated its position. As the United States has pointed out (Br. 27 n.13), there is nothing inappropriate about the agency's setting out its position on an issue that has given rise to litigation. *See United States v. Morton*, 467 U.S. 822, 835 n.21 (1984). Indeed, the split in the circuits on this issue was all the more reason for the agency to take a position.

Third, EDF argues that the EPA memorandum setting forth the agency's position is entitled to no deference because it is not the result of a formal rule-making process. EDF claims that only agency positions reached pursuant to legislatively delegated rulemaking authority are entitled to deference. See Resp. Br. 43. But *Chevron* deference is far broader than EDF acknowledges. This Court stated in *Chevron* itself that while regulations prom-

ulgated pursuant to an express delegation of rulemaking authority are generally held to be controlling, see 467 U.S. at 844, interpretations reached without an express legislative delegation of authority to make administrative rulings are also entitled to deference if reasonable: "Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* (footnote omitted). Therefore, the EPA's interpretation of Section 3001(i), set forth in a memorandum of the Administrator, while not controlling, is nevertheless entitled to deference, since as we explain in our opening brief, it is reasonable.

Nor are the procedures of formal rulemaking prerequisites to *Chevron* deference, as EDF indicates. Agency policies need not be formal to be entitled to deference. This Court has deferred to agency staff opinion memoranda, see *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); informal commentary published by an agency that elaborates on its formal guidelines, see *Stinson v. United States*, 113 S. Ct. 1913, 1918-19 (1993); and agency opinion letters, see *Mead Corp. v. Tilley*, 490 U.S. 714 (1989).[11] An agency position set forth by the head of the agency is entitled to similar deference. As the United States explained in its brief (Br. 26-27), "Administrator Reilly's directive is a formal interpretation by an agency head that establishes current agency policy, has binding effect on subordinate agency officials, and is therefore a legitimate source for *Chevron* deference."

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[11] Cf. *United States v. Alaska*, 112 S. Ct. 1606, 1618-19 (1992) (recognizing that agency policies need not be part of formal regulations and that agencies may establish policy through the administration of agency programs); *Bowen v. Georgetown University Hospital*, 488 U.S. at 212 (principle of deference does not apply to agency positions unsupported by regulations, rulings, or administrative practice).

The principle of deference recognized in *Chevron* turns not on the form an administrator's decision takes, but rather on its substance. If an administrative interpretation is inconsistent with the plain language of a statute, or fails to consider the pertinent statutory factors, it does not merit deference. But when Congress has provided no clear guidance, decisions that involve "more a question of policy than law" must be made, *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); and such decisions "necessarily require significant expertise, and entail the exercise of judgment grounded in policy concerns." *Id.* Deference in such cases is appropriate based not on the form of the agency's decision, but rather because of this Court's "sensitivity to the proper roles of the political and administrative branches." *Id.* See, *e.g.*, *Department of Treasury v. FLRA*, 494 U.S. 922, 933 (1990); *Chevron*, 467 U.S. at 844. If Section 3001(i) is ambiguous, EPA has the expertise to evaluate the costs and benefits of a proposed construction in light of the competing policies found in RCRA. While EDF believes that EPA has underestimated the environmental risks posed by municipal ash, that is precisely the type of judgment in which courts should be least willing to second guess the Administrator.

This observation disposes of EDF's final complaint—that EPA's interpretation of Section 3001(i) is substantively inadequate. Resp. Br. 47-49. In essence, EDF quarrels with EPA's conclusion that municipal incinerator ash can be regulated under Subtitle D in a manner that protects human health and the environment. As the United States explains, EPA's experience and scientific judgment has led it to a different conclusion. U.S. Br. 20-25. RCRA is a complex statute, and EPA is the agency with technical expertise in the area of the subject matter of the statute. The Administrator is ideally suited to weigh the environmental risks posed by disposing of municipal ash in Subtitle D facilities against the burdens on the resource recovery process if Subtitle C

regulation were imposed. He has done so, and found Subtitle D disposal adequate to protect human health and the environment. Here, as in *Chevron,* the Administrator has reconciled conflicting interests in a complex and technical area. It is precisely this type of policy judgment that calls most for deference to EPA, because it is a judgment better left to agencies than courts. EDF's open-ended invitation to this Court to reweigh competing statutory policies should be declined.

CONCLUSION

For all the above reasons, the petitioners respectfully request this Court to reverse the judgment below.

Respectfully submitted,

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